89-825 (1)

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

JOSEPH E. ENGLISH AND ELIZABETH ENGLISH
INDIVIDUALLY AND AS GUARDIANS OF
KERRIE ANN ENGLISH

Petitioners

v.

NEW ENGLAND MEDICAL CENTER HOSPITAL, INC.

Respondent

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

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QUESTIONS PRESENTED

I.

Whether the arbitrary cap on damages imposed by M.G.L.c. 231, Section 85K violates the Fourteenth Amendment of the United States Constitution by depriving victims of charitable tortfeasors of equal protection of the laws.

II.

Whether the arbitrary cap on damages imposed by M.G.L.c. 231, Section 85K violates the Fourteenth Amendment of the United States Constitution by depriving victims of charitable tortfeasors of due process of law.

STATEMENT UNDER RULE 28.4(c)

Since the proceeding draws into question the Constitutionality of M.G.L.c. 231, Section 85K, a statute enacted by the Massachusetts state legislature affecting the public interest and neither the Commonwealth of Massachusetts nor any officer, agency, or employee thereof is a party, it is noted that 28 U.S.C. Section 2403 (b) may be applicable.

No court of the United States as defined by 28 U.S.C. Section 451 has, pursuant to 28 U.S.C. Section 2403 (b), certified to the Attorney General of the Commonwealth of Massachusetts the fact that the Constitutionality of such statute has been drawn in question.

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NEW ENGLAND MEDICAL CENTER HOSPITAL, INC.

Respondent

Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts.

The petitioners, Joseph E. English and Elizabeth English, individually and as guardians of Kerrie Ann English pray a Writ of Certiorari issue to review the judgment and opinion of the Massachusetts Supreme Judicial Court entered in the above entitled proceeding on July 20, 1989.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court in this case is reported at 405 Mass. 423, 541 N.E. 2d 329 (1989) and is reproduced in the appendix attached hereto at pp. 1a to 7a.

JURISDICTION

The judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts was entered on July 20, 1989 affirming the judgment of the Superior Court for petitioner in the reduced amount of $20,000.00.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a).

STATUTE INVOLVED

Massachusetts General Laws Chapter 231, Section 85K.

LIMITATION OF TORT LIABILITY OF CERTAIN CHARITABLE ORGANIZATIONS

It shall not constitute a defense to any cause of action based on tort brought against a corporation, trustees of a trust, or members of an association that said corporation, trust, or association is or at the time the cause of action arose was a charity; provided, that if the tort was committed in the course of any activity carried on to accomplish directly the charitable purposes of such corporation, trust, or association, liability in any such cause of action shall not exceed the sum of twenty thousand dollars exclusive of interest and costs. Notwithstanding any other provision of this section, the liability of charitable corporation, the trustees of charitable trusts, and the

members of charitable associations shall not be subject to the limitations set forth in this section if the tort was committed in the course of activities primarily commercial in character even though carried on to obtain revenue to be used for charitable purposes.

No person who serves as a director, officer or trustee of an educational institution which is, or at the time the cause of action arose was, a charitable organization, qualified as a tax-exempt organization under 26 USC 501(c)(3) and who is not compensated for such services, except for reimbursement of out pocket expenses, shall be liable solely by reason of such services as a director, officer or trustee for any act or omission resulting in damage or injury to another, if such person was acting in good faith and within the scope of his official functions and duties, unless such damage or injury was caused by willful

or wanton misconduct. The limitations on liability provided by this section shall not apply to any cause or action arising out of said person's operation of a motor vehicle.

STATEMENT OF THE CASE

This case involves a claim of medical negligence by Petitioners, Joseph E. English and Elizabeth English individually and as guardians of their daughter Kerrie Ann English. The claim was made against Respondent New England Medical Center Hospital, Inc. (hereafter N.E.M.C.H.), Dr. Lloyd Wilcox and Dr. Glenn Wing. The Complaint and Demand For Jury Trial was entered in the Suffolk Superior Court on May 17, 1983. The Answer of N.E.M.C.H. was filed on July 13, 1983. On November 15, 1983, N.E.M.C.H. by motion amended its Answer to invoke the liability limit imposed by M.G.L.c. 231, Section 85K.

The jury trial commenced on November 13, 1987. On November 23, 1987, upon all the

evidence the jury rendered a special verdict, finding liability as to Respondent N.E.M.C.H. only, and awarded an aggregate of $350,000.00 in damages to Petitioners. On November 25, 1987 Respondent N.E.M.C.H. filed a post-trial motion in the Superior Court to reduce the amount of the jury award to $20,000.00 pursuant to the provisions of M.G.L.c. 231, Section 85K.

The motion was opposed by Petitioners on the basis that the arbitrary reduction of damages to $20,000.00 violated Fourteenth Amendment to the United States Constitution as well as various provisions of the Constitution of the Commonwealth of Massachusetts. The Respondent's motion was allowed by the Superior Court on December 29, 1987. Also on that date, Judgment On Jury Verdict For Plaintiffs in the amount of $20,000.00 with costs was entered by the court. On January 28, 1988, Petitioners filed a timely Notice of Appeal of the

allowance of Respondent's motion to reduce the amount of jury verdict pursuant to M.G.L.c. 231, Section 85K.

On January 13, 1989, the Massachusetts Supreme Judicial Court transferred the case sua sponte from the Appeals Court. The case was argued on April 3, 1989 and decided on July 20, 1989.

The Supreme Judicial Court affirmed the decision of the Superior Court on the basis that the $20,000.00 cap was rationally related to a legitimate public purpose of preserving charitable assets, and thus did not violate the Equal Protection or Due Process provisions of the Fourteenth Amendment.

REASONS FOR GRANTING WRIT

A. THERE IS A CONFLICT AMONG STATE AND FEDERAL JURISDICTIONS CONCERNING THE LIMITATION OF AWARDS FOR PERSONAL INJURIES AND THE ISSUE OF DAMAGE CAPS PRESENTS AN IMPORTANT FEDERAL QUESTION.

The arbitrary reduction of a personal injury award from the amount fairly

determined by a jury ($350,000.00 in the present case) to $20,000.00 as mandated by M.G.L.c. 231, Section 85K deprives Petitioners and all other seriously injured victims of negligent "charities" of both Due Process of law and Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution. The requirements of these two fundamental Constitutional safeguards have been applied inconsistently to damage cap statutes by the various State and Federal Courts which have addressed the subject.

As to the application of the Equal Protection requirements, the lack of consistency centers on the applicable standard of review. The majority of courts which have addressed the issue have used a "heightened degree of scrutiny" to strike down damage caps. Arneson v. Olson, 270 N.W. 2d 125 (N.D. 1978), Carson v. Maurer, 120 N.H. 925, 424 A. 2d 825 (1980), Baptist

Hospital of Southeast Texas, Inc. v. Barber, 672 S.W. 296 (1984), Duren v. Suburban Community Hospital, 24 Ohio Misc. 2d 25, 482 N.E. 2d 358 (C.P. 1985), and See, Jones v. State Board of Medicine, 97 Idaho 859, 555 P. 2d 399 (1976) (case remanded for factual determination and application of heightened scrutiny test.) One jurisdiction has relied upon strict scrutiny to invalidate a damage cap on medical malpractice awards. White v. State of Montana, 203 Mont. 363, 661 P. 2d 1272 (1983). Several courts, including the case at bar have applied the rational basis test to uphold damage caps. Fein v. Permanente, 38 Cal. 3d 137, 211 Cal. Rptr. 368, 695 P. 2d 665 (1985) appeal dismissed, 474 U.S. 892 (1985), Lucas v. United States, 807 F. 2d 414 (5th Cir., 1986), Johnson v. Saint Vincent Hospital, Inc., 273 Ind. 374, 404 N.E. 2d 585 (1980), English v. N.E.M.C.H. 405 Mass. 423, 541 N.E. 2d 329 (1989). (Appendix pp. 1a - 24a.)

There is thus a substantial dispute as to the appropriate application of the Equal Protection clause to this area of the law which only a determination by this Court can resolve. Additionally, the rights of victims and responsibilities of tortfeasors under the United States Constitution is an important Federal question which merits review by this Court.

As to the application of the Due Process protections, "[o]ne of the reasons for the division among the state courts is a question left unresolved by this Court in Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed. 2d 595 (1978)." Fein v. Permanente Medical Group, 474 U.S. 892, 894 (1985) (White, J. dissenting). In Duke Power, this Court declined to decide whether a quid pro quo was Constitutionally mandated when a legislature abrogated a previously existing common law right. Duke Power Co., 438 U.S. at 88.

Several jurisdictions have followed Duke Power Co. and have refused to hold that the elimination of a pre-existing right must be replaced with a satisfactory quid pro quo. Arneson v. Olson, infra, Carson v. Maurer, infra, Baptist Hospital v. Barber, infra. Yet these courts had gone on to hold that the damage caps at issue did not supply an adequate quid pro quo to severely injured victims. Id. Other courts have held outright that no quid pro quo need be supplied. Fein v. Permanente, infra, Jones v. State Board of Medicine, infra, United States v. Lucas, infra, and, See Johnson v. Saint Vincent, infra.

> Whether Due Process requires a legislatively enacted compensation scheme to be a quid pro quo for the common law or state law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several states. The issue is important, and is deserving of this Court's review. Moreover, given the continued national concern over the "malpractice crisis," it is likely

> that more states will enact similar types of limitations, and that the issue will recur. I find, therefore that the federal question presented by this appeal is substantial..."

Fein v. Permanente Medical Group, 474 U.S. at 896. (White J., dissenting.)

B. M.G.L.c. 231, SECTION 85K DEPRIVED PETITIONERS OF EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fourteenth Amendment to the United States Constitution provides that "[n]o state shall...deny to any person within its jurisdiction the Equal Protection of the laws." Statutory classifications challenged as violating the Equal Protection provisions of the Constitution are subject to one of three levels of judicial scrutiny, depending upon the nature of the rights at stake.

If the legislative classification at issue "impermissibly interferes with the exercise of a fundamental right (footnote omitted) or operates to the peculiar disadvantage of a suspect class (footnote

omitted)" then the statute is subjected to strict scrutiny. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1975). An intermediate, or heightened scrutiny standard has been used by this Court when a classification is based upon gender or illegitimacy. See, e.g., Craig v. Boren, 429 U.S. 190 (1976), Mills v. Habluetzel, 456 U.S. 91 (1982). Otherwise, a statute is invalid unless the classifications created are reasonably related to a legitimate state purpose. Exxon v. Eagerton, 462 U.S. 176 (1983).

It has been argued that the heightened level of scrutiny has actually been applied by this Court more broadly to uphold rights not classified as "fundamental", and to protect classes which are not "suspect". Massachusetts Board of Retirement v. Murgia, 427 U.S. at 320 (Marshall, J. dissenting). "Time and again, met with cases touching upon the prized rights and burdened classes

of our society, the Court has acted only after a reasonably probing look at the legislative goal and means, and at the significance of the personal rights and interests involved. Stanton v. Stanton, 421 U.S. 7 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973); Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Powell, J., concurring in judgment); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971). See San Antonio School District v. Rodriguez, 411 U.S. 1 (1972) (Marshall, J., dissenting.).

Petitioners urge this Court to adopt the "heightened scrutiny" test for application to the classifications created by M.G.L.c. 231, Section 85K, and to find these classifications to be violative of the Equal

Protection clause of the Fourteenth Amendment. Nonetheless, it is Petitioners' position that the statute does not satisfy the requirements of the rational basis test either, as the purpose of the statute is not legitimate, and the classifications created are wholly unrelated to the stated purpose. The statute's failure to satisfy this more deferential standard of review will be addressed first.

1. THE CLASSIFICATIONS CREATED AND THE LIMITATION IMPOSED BY M.G.L.c. 231, SECTION 85K ARE NOT RATIONALLY RELATED TO A LEGITIMATE PUBLIC PURPOSE.

In implimenting the rational basis test, two issues must be addressed: 1) whether the challenged statute has a legitimate purpose, and 2) whether it was reasonable for the lawmaker to believe that the use of the challenged classification would promote that purpose. Western and Southern Life Insurance Company v. State Board of Equalization of California, 451 U.S. 648,

668 (1981). The statute in question does not satisfy either of these requirements.

The legislative purpose of M.G.L.c. 231, Section 85K is not legitimate. When this statute was first proposed in 1971, the then Governor Francis Sargent adopted the recommendation of the Judicial Council that "[i]t is necessary for the legislature to balance the desirability of protection for such [charitable] corporations which include schools, social organizations, museums, and all other kinds of nonprofit institutions as well as hospitals against the interest of the person who is injured as a result of a tort for which the nonprofit corporation is responsible." House No. 5976. (Emphasis added.) (Appendix p. 36a.)

In the present case, the Supreme Judicial Court stated that "[t]he objective of Section 85K clearly is to protect the funds of charitable institutions so they may be devoted to charitable purposes. That

objective is just as clearly legitimate. If a charity's property were 'depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and the charitable gifts discouraged.' (Citation omitted.)" English et al. v. New England Medical Center Hospital, Inc., 405 Mass. at 429, 541 N.E. 2d at 333 (See Appendix p. 20a.) Special protection for charitable institutions has long been recognized as an unnecessary anachronism.

> [E]xperiences in other jurisdictions had demonstrated that no calamitious social effects would result from dissolution of the charitable immunity; that the availability of insurance had obviated any threat that recoveries against charities would seriously deplete their funds and deprive communities of their benefits; and that individuals should not be forced to suffer the unmitigated and oftentimes crushing burden of injuries wrongfully inflicted merely to continue a judicially inspired immunity long since outdated by the impact of modern times...

> [I]f the enlargement of their tort responsibilities actually results in additional premiums, that should be considered as but incidental to the rendering of equal justice to all innocent parties who are injured through the negligence of others.

Callopy v. Newark Eye and Ear Infirmary, 141 A.2d 276, 282 (1958), and see Bing v. Thunig, 2 N.Y. 2d 656, 143 N.E.2d 3, 7 (1957) President and Directors of Georgetown College v. Hughes, 130 F.2d 810, 823-4 (D.C. Cir. 1942), Pierce v. Yakima Val. Memorial Hospital Ass'n., 43 Wash.2d 162, 171-2, 260 P.2d 765 (1953).

The Restatement of Torts in Section 895E "provides flatly that charitable and other benevolent enterprises obtain no immunity merely because of their charitable nature." Prosser and Keeton, The Law of Torts, 5th Edition. p. 1070 (1984). "Ordinarily, when a court decides to abandon a court-made rule of long standing, it starts out by saying 'the reason for the rule no longer exists.'

In this case, it is correct to say that the 'reason' originally given for the rule of immunity never did exist." Pierce v. Yakima Val. Memorial Hospital Ass'n, 260 P.2d 765, 768 (1953).

"If the matter is regarded as 'diverting the fund to persons not within the class intended for aid,' it is impossible to assume that the donor intends everyone except the special object of his bounty to have reparation. If any assumption were justified, it would be exactly the contrary one." President and Directors of Georgetown College v. Hughes, 130 F.2d 810, (D.C. Cir. 1942), Granger v. Deaconess Hospital of Grand Forks, 138 N.W. 2d 443, 449 (N.D. 1965).

"The doctrine of charitable immunity does not comport with elementary logic or fundamental justice. It violates a basic principle of our law - for negligent or tortious conduct liability is the rule,

immunity the exception. It fosters neglect while liability tends to induce care and caution. It has no proper place in today's social and economic structure." Adkins v. St. Francis Hospital of Charleston, 149 W.Va. 705, 143 S.E. 2d 154, 163 (1965). "[C]haritable corporations should respond as others do for the wrongs inflicted by persons who act in their behalf about their business and within the course of their duties, actual or apparent. Immunity, whether full or partial, is to be granted only when compelling reason requires it. If there has been, there is no longer such reason." President and Directors of Georgetown College v. Hughes, 130 F.2d at 825.

In addition, the legitimacy of the state afforded protection of M.G.L.c. 231, Section 85K is further eroded by subsequent additional legislative protection for charitable hospitals. The recent passage of

the Universal Health Care Bill renders the faulty justifications for limited liability of health care providers even more remote from the actual state of affairs. As a greater number of patients are covered by health insurance, the 'charitable' hospital becomes more like any other hospital or business which receives payment for services rendered, and less in need of protection.

Hospitals are further protected against frivolous claims by M.G.L.c. 231, Section 60B, which was enacted in 1976. That statute requires that every malpractice claim be submitted to a Medical Malpractice Tribunal for a determination of whether there is sufficient evidence to warrant further judicial inquiry. In cases that proceed to trial, since 1986, any damages awarded against a health care provider are subject to the limitations imposed by M.G.L.c. 231, Sections 60F, 60G and 60H which include introduction of evidence

concerning "collateral source" payments made, and a monetary cap of $500,000.00 on general damages.

Since 1975 hospitals have also had the protection of M.G.L.c. 175A, Section 5A. The availability of insurance through the Joint Underwriting Association (JUA) benefits hospitals by "regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory..." M.G.L.c. 175A, Section 2.

All hospitals with acute care services (emergency rooms) now have available the funds provided by M.G.L.c. 6A, Section 75. Enacted in 1985 that statute established a "statewide uncompensated care pool" to reimburse hospitals for services rendered to nonpaying emergency room patients.

Considered in light of the initial lack of a need for protection for charities, the various additional protections recently afforded to hospitals in Massachusetts

renders the purpose of M.G.L.c. 231, Section 85K illegitimate beyond all doubt. It is well established that a change in circumstances can render a statute invalid even if it was valid when enacted. Newton v. Consolidated Gas Co., 258 U.S. 165 (1922), Chastleton Corp. v. Sinclair 264 U.S. 543 (1924).

In the present case, the Supreme Judicial Court recognized that the purchasing power of a dollar has eroded three-fold since the $20,000.00 limit in M.G.L.c. 231, Section 85K was set in 1971. Thus, Petitioners' award of approximately $750,000.00 including interest was reduced, in real dollars, to approximately $6,300.00 (as of April 1989). Nonetheless, the Court stated that "it is not the court's prerogative to determine whether a more equitable distribution of the burden of negligently inflicted personal injuries could be devised." English, 405 Mass. at 430, 541 N.E. 2d at 333 (Appendix p. 22a.).

A damage cap of $1.00 is thus permissible and beyond the scope of judicial review. Thus, even though it is the stated legislative purpose to "balance the desirability of protection for such [charitable] corporations... against the interest of the person who is injured as a result of a tort for which the nonprofit corporation is responsible...", the Supreme Judicial Court has extended "judicial deference" to the point where the statute need not even achieve its stated purpose.

It is apparent from the face of the statute, from its application and from its effect that there are no benefits to any victims, and that a 'balance' was never even attempted. How the continued proscription of a fundamental common law right can be said to promote a "balance" when the burdens imposed upon victims are compared to the substantial benefits granted to charities, is beyond comprehension.

The amount chosen by the legislature as an absolute cap on all damages for personal injury victims is dwarfed by comparison to the minimum compulsory automobile insurance required by M.G.L.c. 175, Section 113L. Each resident of the Commonwealth, regardless of means, must maintain at least $20,000.00 of automobile insurance in order to register and use an automobile. That identical dollar amount set as a maximum award that any charitable corporation must pay for negligent behavior is grossly unfair, unjust, and arbitrary.

Notwithstanding the absurdity of the cap amount, the patent lack of a legitimate state purpose attributable to M.G.L.c. 231, Section 85K must be recognized by this Court. The statute must be seen as the product of a powerful lobby securing unneeded protection from the legislature at the expense of an unrepresented and powerless class of victims. The statute is

not a legitimate balancing of interests after careful consideration. It is a display of arbitrary power, not an exercise of judgment. Mathews v. DeCastro, 429 U.S. 181, 185 (1976).

Assuming for purposes of argument that the stated public purpose of M.G.L.c. 231, Section 85K is legitimate, i.e. preservation of charitable assets, the classifications created by the statute are not reasonably related to that purpose. M.G.L.c. 231, Section 85K creates several classifications. It distinguishes between victims of charitable tortfeasors and all other victims. It further distinguishes between those victims who suffer damages in excess of $20,000.00 and those who don't. The statute fails to make a distinction between victims to whom $20,000.00 would be a boon and those to whom it would barely be a beginning. Waggoner v. Gibson, 647 F. Supp. 1102, 1104 (N.D. Tex. 1986). The

victims most in need of protection, the severely injured, are thus burdened the most. "Limiting the recovery of the most deserving victims...is not a legitimate interest of the state..." Id. at 1106. As to victims of charitable tortfeasors, the articulated purpose of the statute is thus thwarted by the classifications it creates.

The effect is similar for the charitable tortfeasors. A charity with insufficient assets to withstand a $20,000.00 judgment is not protected by the statute at all, but is instead condemned to extinction. And if the "chilling effect" on donations were a legitimate concern, the $20,000.00 cap would have the effect of dissuading mainly donors to small, low asset charities from donations.

M.G.L.c. 231, Section 85K is further flawed in that it fails to consider the ability of the tortfeasor to satisfy a judgment in excess of the cap amount. It

also gives no consideration to the degree of risk associated with the charitably incorporated business. There is obviously a greater risk that a hospital will inflict injury as opposed to a library or soup kitchen. "[A] common liability ceiling is likely to underprotect the patrons of the former, (if not both)." Note: The Quality of Mercy: "Charitable Torts" And Their Continuing Immunity, 100 Harvard L.Rev. 1382, 1393 (1987).

Thus, the classifications created by M.G.L.c. 231, Section 85K are not even remotely related to its stated purpose, but are in fact antithetical to it. As to victims, no benefits inure, and the burdens are placed wholly upon those most in need and most deserving of benefits. As to charities, those most in need of protection don't get it, and those who get it don't need it.

> [The equal protection clause] requires that all persons subject to...legislation shall be treated

> alike, under like circumstances and conditions, both in the privileges conferred, and in the liabilities imposed. Thus the guaranty was intended to secure equality of protection not only for all but against all similarly situated.

Hayes v. Missouri, 120 U.S. 68 (1887).

M.G.L.c. 231, Section 85K fails abjectly to adhere to this mandate. Nor was the mandate properly enforced by the Supreme Judicial Court of Massachusetts. The severe hardships which the statute inequitably distributes for no valid reason is an injustice that must not be permitted to continue. This Court must strike down the statute on the basis that it violates the Equal Protection guarantees of the Federal Constitution.

2. THE CLASSIFICATION CREATED AND THE LIMITATION IMPOSED BY M.G.L.c. 231, SECTION 85K ARE ARBITRARY, UNREASONABLE AND NOT FAIRLY AND SUBSTANTIALLY RELATED TO THE OBJECT OF THE STATUTE.

In applying Federal Equal Protection standards to damage cap statutes, the vast majority of State courts have used a

"heightened degree of scrutiny" due to the fundamental importance of the rights of stake. Arneson v. Olson, infra, Carson v. Maurer, infra, Baptist Hospital of Southeast Texas, Inc. v. Barber, infra, Duren v. Suburban Community Hospital, infra, Jones v. State Board of Medicine, infra. Relying upon Reed v. Reed, 404 U.S. 71 (1971) and Royster Guano Co. v. Virginia, 253 U.S. 412 (1920) those courts have found the right of tort victims to recover damages from the wrongdoer to be an important substantive right that warrants more judicial protection than is permitted by the rational basis test. Accordingly, those courts have held that the classifications created by the statute "must be reasonable, not arbitrary and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. at 76, Royster Guano Co., 253 U.S. at 415.

State courts have also employed this standard to the Equal Protection guarantees of their own constitutions. Hunter v. North Mason High School, 85 Wash. 2d 810, 539 P. 2d 845 (1975), Lucas v. United States , 757 S.W. 2d 687 (Tex. 1988).

In applying the rational basis test in the present case, the Supreme Judicial Court made no inquiry whatsoever into the relationship (or lack thereof) of the classifications created by M.G.L.c. 231, Section 85K and the public purpose. The court specifically declined to apply the heightened degree of scrutiny, because they were not obligated to do so. English, 405 Mass. at 429, 541 N.E. 2d at 333 (Appendix p. 18a - 19a.)

Petitioners request that this Court determine that the appropriate standard of Equal Protection review to be applied under the Federal Constitution is the heightened scrutiny test adopted by the majority of state courts for damage caps.

Under the more in-depth scrutiny permitted by the heightened scrutiny test, the inequities and deficiencies of the statute cry out for correction. The statute denies Petitioner and all seriously injured victims of charitable negligence of "equal protection of the law, in that it creates an arbitrary damage limitation and thereby precludes only the most seriously injured victims...from recovering full compensation for their injuries." Carson v. Maurer, 424 A. 2d at 837. For the unfortunate one who is severely injured, "[t]he risk of loss is therefore shifted to the [victim] who can least afford it and who is in the worst position to guard against it." Judicial Review of Medical Malpractice Legislation, XX Suffolk U.Law Rev. 523, 532 (1986). "The law ought not, and characteristically does not, place a second burden on a party just when and just because the party has suffered a burden already." The Quality of Mercy, infra at p. 1390.

"[I]t is certainly true that a personal injury is no less painful, disabling, costly, or damage producing simply because it was inflicted by a charitable institution rather than by any other party or entity. Indeed, it is almost contradictory to hold that an institution organized to dispense charity shall be charitable and give aid to others but shall not compensate or aid those individuals who have been injured by it." Albritton v. Neighborhood Center for Child Development, 12 Ohio St. 3d 210, 213, 416 N.E. 2d 867, 871 (1984).

In the case of charitable hospitals, to maintain that for liability purposes they can be put in a category with museums, schools and soup kitchens is unsupportable. In addition to the increased risk of injury that hospital patrons face, and the fact that virtually any licensed hospital is a big business capable of bearing that risk, the hospital industry is heavily regulated.

Massachusetts hospitals, whether charitable or not, are not exempted from the legal standard of care for medical providers as set forth in Brune v. Belinkoff, 354 Mass. 102, 235 N.E. 2d 793 (1968). Yet, if liability is capped at $20,000.00, or any other arbitrary amount, the legal standard of care is nullified, as there is no penalty for its breach. The public is in no way benefited by a lowering of the standard of care. "[T]he tendency of immunity [is] to foster neglect and...liability to induce care and caution..." President and Directors of Georgetown College v. Hughes, 130 F. 2d at 824. The public is better served by the basic principle of tort law that a negligent party is liable for damages caused by his wrongful conduct.

In the initial propounded versions of M.G.L.c. 231, Section 85K, charitable institutions other than health care

providers were granted total immunity, with health care providers being subjected to liability to the amount of $25,000.00. See House Nos. 5716 and 5801.(Appendix pp. 25a - 33a.) Though still woefully inadequate, the distinction indicates that the legislature obviously recognized that hospitals should be treated differently from other charities.

"If a hospital functions as a business institution, by charging and receiving money for what it offers, it must be a business establishment also in meeting obligations it incurs in running that establishment. One of the inescapable obligations is that it must exercise a proper degree of care for its patients, and to the extent that it fails in that care, it should be liable in damages as any other commercial firm would be liable." Flagiello v. Pennsylvania Hospital, 417 Pa. 486, 208 A. 2d 193, 197 (1965).

"[A] policy exempting a charitable

organization from having to compensate for harm caused by it is equivalent to requiring an injured individual to make an unwilling contribution to that organization in the amount of the compensation which would be due him had he been injured by a noncharitable entity...Such coerced donations are inimical to the whole concept of charitable donation and service. They are, to say the lease, distinctly uncharitable." Albritton, 466 N.E. 2d at 871.

The $350,000.00 donation excluding interest that the Englishs' were forced to make by M.G.L.c. 231, Section 85K is their second donation to the coffers of the New England Medical Center Hospital, Inc. They already paid a "fair and reasonable charge" for the negligent medical treatment rendered.[1] That a public benefit could

1. Medical expenses paid to Respondent amounted to $11,830.62.

inure from this forced donation is a paradox. Deprived of compensation from the wrongdoer, the severely and permanently injured victim thus becomes a public charge, unless he is independently wealthy.

The severe hardships which M.G.L.c. 231, Section 85K inequitably distributes for no valid reason constitute an injustice that must not be permitted to continue. The benefits of the statute inure only to wealthy negligent charities. The burdens are mercilessly heaped upon the severely injured victims. Our Founding Fathers could not have intended that the Constitution would protect such a travesty of justice. This Court must strike down M.G.L.c. 231, Section 85K on the basis that it violates the Equal Protection guarantees of the United States Constitution.

C. M.G.L.c. 231, SECTION 85K DEPRIVED PETITIONERS OF DUE PROCESS OF LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The due process clause of the Fourteenth

Amendment to the United States Constitution prohibits governmental action from depriving "any person of life, liberty or property without due process of law..." Due Process grants the right to be free from unwarranted governmental intrusions into an individual's exercise of protected freedoms. Cleveland Board of Education v. La Fleur 414 U.S. 632, 639-40 (1973). The test of Constitutionality under the Due Process clause is "whether the statute bears a reasonable relation to a permissible legislative objective." West Coast Hotel v. Parrish 300 U.S. 379 (1937).

When a legislative enactment abrogates a common law right of recovery, it has been argued, but never decided by this Court whether a satisfactory quid pro quo must be provided. Duke Power Co., supra, New York Central R. v. White, 243 U.S. 188 (1967). When faced with this issue in Duke Power Co., this Court stated "we need not resolve

this question here since the Price-Anderson Act does, in our view, provide a reasonably just substitute for the common law or state tort law remedy it replaces." Duke Power Co., 438 U.S. at 88.

The same cannot be said for M.G.L.c. 231, Section 85K. There is no individual benefit for any tort victim, and there is no societal benefit to justify the ridiculously low recovery cap. "[T]here is no doubt that limiting the amount of recovery of malpractice victims displaces a common law cause of action in tort...[and] that displacement is, indeed, arbitrary and unreasonable when balanced against the purpose of the statute." Waggoner v. Gibson, 647 F. Supp. 1102, 1108 (N.D. Tex. 1986) ($500,000.00 cap on medical malpractice actions struck down.)

As for the individual victims, there is no imposition of strict liability, no reduced burden of proof, and no guarantee of

a certain and speedy recovery, all elements of the satisfactory quid pro quo found present in Duke Power Co.

The miserly remedy allowed by M.G.L.c. 231, Section 85K was not assured or guaranteed, but was attained by Kerrie Ann only after five (5) years of hard fought litigation. Both the Respondent New England Medical Center Hospital, Inc., and its insurer were aware that their ultimate liability could not exceed $20,000.00, and they refused to make any offer of settlement even after liability was clearly established through pretrial discovery and also at trial.

All three defendants in the action below were represented by the same insurer, Joint Underwriting Association. The individual defendant doctors were not, of course, subject to the de facto immunity granted by M.G.L.c. 231, Section 85K. The only significant exposure to the insurance

company, then, was through the doctors. Both doctors attended the week long trial religiously and both testified at length. The Respondent Hospital, on the other hand, did not call a single employee or servant to testify in its defense. In fact, its only witness was an expert witness, a nurse who was employed by another hospital and had no personal knowledge concerning the medical care and treatment at issue. The nurses who actually participated in the medical treatment of Kerrie Ann were available, and had been deposed. The hospital, with its immune status, was permitted to "take the fall", and it did. The insurer succeeded both in unfairly depriving the Petitioners of their recovery, and avoiding a substantial tort judgment.

The limit imposed by M.G.L.c. 231, Section 85K thus served not as an "adequate substitute" to the Petitioners' right to

recover, but as an incentive for "charitable" health care providers to litigate extensively and defensively. The recovery cap is thus used as a tool by charitable institutions and their insurers to render seriously injured victims of negligent harm legally impotent and unable to pursue their common-law right to recover damages by causing them to bear the heavy burden of extensive litigation costs.[2] "[L]imitation of recovery does not provide adequate compensation to patients with meritorious claims; on the contrary it does just the opposite for the most seriously injured claimants. It does nothing toward the elimination of unmeritorious claims." Waggoner v. Gibson, 647 F. Supp. at 1105, Arneson v. Olsen, 270 N.W. 2d at 135-136.

2 Kerrie Ann Englishs' out of pocket litigation expenses were approximately $30,000.00, as they would be in almost any action involving medical expert witnesses.

M.G.L.c. 231, Section 85K actually has the untoward result of shielding and promoting charities whose agents and servants are negligent in the pursuit of their charitable purposes. The statute protects the wrongdoer and it renders a grievious injustice to society by removing the motivation to prevent harm since the risk of loss to the charitable institution is minimal.

D. THE DECISION OF THE MASSACHUSETTS SUPREME JUDICIAL COURT IS BASED UPON FEDERAL LAW AND IS NOT SUPPORTED BY AN ADEQUATE AND INDEPENDENT STATE GROUND

The decision of the Massachusetts Supreme Judicial Court which gives rise to the present Petition is based fundamentally upon decisions of this Court interpreting the Equal Protection and Due Process clauses of the United States Constitution. The Supreme Judicial Court has historically and consistently based its decisions concerning

Equal Protection and Due Process claims squarely upon Federal law. See, e.g. Dickerson v. Attorney General, 396 Mass. 740, 488 N.E. 2d 757 (1985), Fine v. Contributory Retirement Appeal Board, 401 Mass. 639, 518 N.E. 2d 1151 (1988), American Manufacturers Mutual Insurance Company v. Commissioner of Insurance, 374 Mass. 181, 372 N.E. 2d 520 (1978), Paro v. Longwood Hospital, 373 Mass. 645, 369 N.E. 2d 985 (1977), Blue Hills Cemetary v. Board of Registration in Embalming and Funeral Directing, 379 Mass. 368, 398 N.E. 2d 471 (1979).

Virtually every state court decision relied upon in the Equal Protection and Due Process sections of the decision is based squarely on decisions by this Court interpreting the Federal Constitution. For example, Blue Hills Cemetary, supra, American Manufacturers Mutual Insurance Company, supra, and Klein v. Catalano, 386

Mass. 701, 437 N.E. 2d 514, (1982) are all cited as the source of a quote concerning the presumption of constitutionality of a statute. English v. New England Medical Center Hospital, Inc., 405 Mass. at 427-8, 541 N.E. 2d at 332. (Appendix p. 15a - 16a.) In each case, that quote is derived directly from El Paso v. Simmons, 379 U.S. 479, 508-9 (1965). Fine v. Contributory Retirement Appeal Board, supra, cited as authority for a statement of the rational basis standard of review, itself relied upon Massachusetts Board of Retirement v. Murgia, supra, and New Orleans v. Dukes, 427 U.S. 279 (1976), and Paro v. Longwood Hospital, infra, cited in reference to the existence of an intermediate standard of Equal Protection review, in turn relied exclusively upon Supreme Court precedent. Id., 396 N.E. 2d at 988, Fn. 6.

It is apparent that the "Court decided the case the way it did because it believed

that federal law required it to do so." Michigan v. Long. 463 U.S. 1039, 1041 (1983). Both the Federal and State Constitutions are specifically mentioned in the Equal Protection and Due Process sections of the opinion only twice. Given the degree to which the Massachusetts decisions have relied upon Federal law in this area of Constitutional interpretation, it is at least true that the grounds of decision are so interwoven, as between State and Federal, that this Court's jurisdiction is plain. See, Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157, 164 (1917).

If the Supreme Judicial Court had intended to base their decision upon an adequate and independent state ground, then a "plain statement in the judgment or opinion" to that effect should have been inserted. Michigan v. Long, 463 U.S. at 1041.

In the absence of such a statement, this Court can, and should review the decision of the Supreme Judicial Court to bring consistency and fairness to these unsettled areas of the law.

CONCLUSION

Kerrie Ann English and her parents appeal to the United States Supreme Court for it to carry out that responsibility which our Founding Fathers infused in its raison d'etre. Our Constitutional roots reach back to Runnymede where in 1215 the Magna Carta was created. The most fundamental principles of that doctrine became the lifeblood of our U.S. Constitution: Equality under the law and Limitation of arbitrary power. Those principles have been defiled in the case before you. A charitable tortfeasor has received special treatment because of the arbitrary power of the state government. Thomas Paine in American democracy's most

seminal work, Common Sense, stated that "government even in its best state is but a necessary evil [and] in its worst state an intolerable one." This Court must be guided by the words of Chief Justice John Marshall, who in Marbury v. Madison, 1 Cranch 137, 176, 1 L.Ed. 60 (1803) stated that

> "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten....To what purpose are those powers limited...if these limits may, at any time be passed by those intended to be restrained."

For the foregoing reasons, inter alia, the Petitioners contend that they have been denied Equal Protection and Due Process of law by the Massachusetts Supreme Judicial Court's application of M.G.L.c. 231, Section 85K and the Petitioners pray that this Court issue a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

AT BOSTON,

July 20, 1989

IN THE CASE NO. SJC-5015

JOSEPH E. ENGLISH & another, guardians

vs.

NEW ENGLAND MEDICAL CENTER, INC., & others.

pending in the Superior Court Department of the Trial Court for the County of Suffolk No. 61745

ORDERED, that the following entry be made in the docket; viz., ---

Judgment affirmed.

BY THE COURT,

/s/ Jean M. Kennett, CLERK

July 20, 1989

405 Mass. 423

Joseph E. ENGLISH et al.,[1]

guardians,[2]

v.

NEW ENGLAND MEDICAL

CENTER, INC., et al.[3]

Supreme Judicial Court of Massachusetts,

Suffolk.

Argued April 3, 1989.

Decided July 20, 1989.

Plaintiffs in medical malpractice case appealed judgment of the Suffolk Superior Court, John C. Cratsley, J., reducing jury award against hospital from $350,000 to $20,000. The Supreme Judicial Court, O'Connor, J., held that statute limiting liability of charitable institutions to $20,000 if tort was committed in course of activity carried on to accomplish purpose of charitable organization did not violate

1. Elizabeth English.
2. Of Kerrie Ann English.
3. Glenn Wing and Lloyd Wilcox, who are not parties to this appeal.

right to jury trial, equal protection, or substantive due process.

Affirmed.

1. Jury 34(1)

Right to jury trial does not grant to party the right to put to jury any question he or she wishes; rather, it means that, with respect to those questions of fact that substantive law makes material, party has right to have determination made by jury. M.G.L.A. Const. Pt. 1, Art. 15.

2. Charities 45(2)

Jury 34 (1)

Statute placing $20,000 cap on charitable institutions' liability for torts committed in course of activity carried on to accomplish purpose of charitable organization does not violate constitutional right to jury trial. M.G.L.A. c. 231, Section 85K; M.G.L.A. Const. Pt. 1, Art. 15.

3. Charities 45(2)

Constitutional Law 243(2), 299(2)

Statute imposing $20,000 cap on charitable institution's liability for torts committed in course of activity carried on to accomplish purpose of charitable organization does not violate equal protection or substantive due process; objective of protecting funds of charitable institutions so they can be devoted to charitable purposes is legitimate and means chosen bear rational relationship thereto, even if amount of statutory cap is low. M.G.L.A. c. 231, Section 85K, U.S.C.A. Const.Amends. 5,14.

Charles S. Mancuso, Westwood (Kevin G. McIntyre, with him), for plaintiffs.

Carol A. Griffin (David M. McCarthy and Laurie J. Condos, Boston, with her), for defendant.

John W. Van Lonkhuysen and Robert A.

Faucher, Brookline, amicus curiae, for Beth Israel Hosp. Ass'n et al.

Bill Wagner of Florida, Jeffrey Robert White of the Dist. of Columbia, and Anthony Tarricone, Boston, amicus curiae, for Ass'n of Trial Lawyers of America.

Walter H. Mayo, III, and Robert E. Cowden, III, Boston, amicus curiae, for Massachusetts Council of Human Services Providers, Inc.

Patrick R. Carroll, William T. McGrail, Clinton, Dorthy Grandolfi Wagg, Burlington, Vincent F. O'Rourke, Jr., and Barry A. Bachrach, Worcester, amicus curiae, for Massachusetts Hosp. Ass'n, Inc.

John H. Mason, Deborah S. Steenland, Boston, and John W. Spillane, Worcester, amicus curiae, for Independent School Ass'n of Massachusetts et al.

Before LIACOS, C.J., and WILKINS, ABRAMS and O'CONNOR, JJ.

O'CONNOR, Justice.

This is a medical malpractice case arising out of treatment rendered to Kerrie Ann English by two physicians at the defendant's hospital. The jury returned verdicts in favor of the physicians, who were originally defendants, but against the hospital, and assessed damages in the amount of $350,000. In response to the hospital's motion, the trial judge reduced the award to $20,000 pursuant to G.L. c. 231, Section 85K (1986 ed.). On appeal, the plaintiffs challenge the reduction of the verdict as violating the equal protection and due process clauses of the Massachusetts and United States Constitutions and the trial by jury guarantee of art. 15 of the Declaration of Rights of the Massachusetts Constitution. We transferred the case to this court on our

own initiative.[4]

This court adopted the doctrine of charitable immunity in 1876. In McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, 436 (1876), we held that Massachusetts General Hospital, a public charity, would not be liable to one injured by the negligence of agents of the hospital. The court reasoned that the hospital held its funds in trust for the benefit of the public, and that it would be an unlawful diversion of those

4. We acknowledge the filing of amicus curiae briefs on behalf of the following organizations: Independent School Association of Massachusetts; Massachusetts Association of Nonprofit Schools and Colleges; Massachusetts Council of Human Services Providers, Inc.; Massachusetts Hospital Association, Inc.; Association of Trial Lawyers of America; The Beth Israel Hospital Association; Brigham and Women's Hospital, Inc.; The Children's Hospital; Dana Farber Cancer Institute; Massachusetts General Hospital; Mount Auburn Hospital; and New England Deaconess Hospital.

funds to apply them to the satisfaction of a judgment based on the negligence of hospital agents. Id. at 435-436. See Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66, 69, 126 N.E. 392 (1920). Following our decision in McDonald v. Massachusetts Gen. Hosp., supra, we consistently applied the charitable immunity doctrine to hospitals and other charitable organizations until G.L. c. 231, Section 85K, became effective on September 16, 1971. St.1971, c. 785. See, e.g., Ricker v. Northeastern Univ., 361 Mass. 169, 172, 279 N.E. 2d 671 (1972) (private university); Boxer v. Boston Symphony Orchestra, Inc., 342 Mass. 537, 538-541, 174 N.E. 2d 363(1961) (symphony orchestra); Carpenter v. Young Men's Christian Ass'n, 324 Mass. 365, 369, 86 N.E. 2d 634 (1949) (association promoting moral, mental, and physical welfare of young men);

Reavy v. Guild of St. Agnes, 284 Mass. 300, 302, 187 N.E. 557 (1933) (temporary shelter provided to needy women and children).

In Simpson v. Truesdale Hosp., Inc., 338 Mass. 787, 787-788, 154 N.E. 2d 357 (1958), the plaintiff urged us to overrule McDonald v. Massachusetts Gen. Hosp., supra. We declined, noting that "[w]hile as an original proposition the doctrine might not commend itself to us today, it has been firmly embedded in our law for over three quarters of a century and we think that its 'termination should be at legislative, rather than at judicial, hands' (citations omitted)." Later, in Cloby v. Carney Hosp., 356 Mass. 527, 528, 254 N.E. 2d 407 (1969), we again observed that any renunciation of the charitable immunity doctrine would be best accomplished by legislative action. However, on the assumption that legislative action would be unlikely in the near future,

we announced our intention to abolish the doctrine "the next time we [were to be] squarely confronted by a legal question respecting [it]." Id. In 1971, after our decision in Colby, the Legislature enacted G.L. c. 231, Section 85K. Section 85K abolishes the doctrine of charitable immunity, and limits the liability of charitable institutions to $20,000 if the tort was committed in the course of an activity carried on to accomplish the purpose of the charitable organization.

In Colby, supra, the defendant in its answer had advanced charitable immunity as a defense. The plaintiff demurred, contending that the doctrine violated the Federal and Massachusetts Constitutions. We affirmed the judge's overruling of the demurrer, saying that "[n]othing ha[d] been brought to our attention suggesting that the doctrine of charitable immunity is repugnant to any

provision of the Constitutions of the United States and the Commonwealth." Id. at 528, 254 N.E. 2d 407. The plaintiffs now challenge the constitutionality of the $20,000 statutory cap. Consistently with our statement in Colby, which at least suggested that the doctrine of charitable immunity is constitutional, we hold today that the statutory cap also is constitutional. We are not without misgivings about the paltriness of the $20,000 cap, especially in light of the decline in the value of the dollar since 1971, but we cannnot correctly declare the statute to be unconstitutional. A change in the amount of the cap may be appropriate but that is a legislative decision.[5] We affirm the judgment below.

5. According to the Consumer Price Index for all urban Consumers published by the United States Department of Labor Bureau of Labor Statistics, the purchasing power of $1 in 1971 was the same as the purchasing power of $3.04 in April, 1989.

[1,2] The plaintiffs challenge Section 85K as violating their right to a jury trial guaranteed by art. 15. It does not. The right to a jury trial does not grant to a party the right to put to a jury any question he or she wishes. Rather, the right to a jury trial means that, with respect to those questions of fact that the substantive law makes material, the party has the right to have the determination made by a jury. See Karlowski v. Kissock, 275 Mass. 180, 182, 175 N.E. 500 (1931); Bothwell v. Boston Elevated Ry., 215 Mass. 467, 102 N.E. 665 (1913). No question material to the plaintiffs' cause of action was withdrawn from the jury. Under the substantive law of torts of this Commonwealth, charitable organizations are not liable for personal injuries in excess of $20,000, and therefore the plaintiffs had no right to a jury determination of damages

in excess of that amount. Pinnick v. Cleary, 360 Mass. 1, 271 N.E. 2d 592 (1971), is on point. In Pinnick, we held that, although the no-fault automobile insurance statute, St.1970, c. 670, eliminated an individual's right to damages for pain and suffering unless his or her medical expenses were at least $500,[6] or the injuries were of a particular kind, the statute did not violate the jury trial guarantee of art. 15. Id. at 31, 271 N.E. 2d 592.

The case of Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 404 N.E. 2d 585 (1980), like the present case, raised the question whether the imposition of a cap on damages violates a right to jury trial provided by a State constitution. Although

6. But see St.1988, c. 273, Section 55 (now $2,000).
We note that St.1988, c. 273, Section 15, amended the definition of the term, "Personal injury protection," in G.L. c. 90, Section 34A, to provide no-fault benefits of $8,000, a four-fold increase of the previous $2,000 amount.

the cap in that case was $500,000, the principle involved is the same. In rejecting the plaintiffs' argument that the limitation on damages violated their jury trial rights, the Supreme Court of Indiana reasoned that "[t]he Legislature may terminate an entire valid and provable claim through a statute of limitation. It may validly cause the loss of the right to trial by jury through failure to comply with the requirement to assert the right by procedural rule. It is the policy of this Act that recoveries be limited to $500,000, and to this extent the right to have the jury assess damages is available. No more is required by Art. I, Section 20, of the Indiana Constitution in this context." Id. at 401, 404 N.E. 2d 585. Similarly, art. 15 guaranteed the plaintiffs' right to have the jury assess damages up to $20,000, but nothing more. Thus, there was no

infringement of the plaintiffs' right to jury trial.

We turn our attention to the plaintiffs' other contentions, namely, that Section 85K violates their rights to equal protection and substantive due process by impermissibly infringing on "the personal, substantive right of a tort victim to recover damages." We have repeatedly said that those who challenge the constitutionality of a statute that does not burden a suspect group or a fundamental interest "carry a heavy burden in seeking to overcome the statute's presumption of constitutionality." Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing, 379 Mass. 368, 371, 398 N.E. 2d 471 (1979), quoting American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 190, 372 N.E. 2d 520 (1978). Klein v.

Catalano, 386 Mass. 701, 706-707, 437 N.E. 2d 514 (1982).

The statute at issue does not burden a suspect group, and "the personal, substantive right of a tort victim to recover damages" is not a "fundamental interest." For purposes of equal protection analysis under the Federal and State Constitutions, our opinions declare that, "[a]bsent a showing that a statute burdens a suspect group or fundamental interest, it will be upheld as long as it is rationally related to the furtherance of a legitimate State interest." Dickerson v. Attorney Gen., 396 Mass. 740, 743, 488 N.E. 2d 757 (1986). Klein v. Catalano, supra 386 Mass. at 715, 437 N.E. 2d 514. The statute "only need[s] be supported by a conceivable, rational basis." Fine v. Contributory Retirement Appeal Bd., 401 Mass. 639, 641, 518 N.E. 2d 1151 (1988). Nonetheless, the plaintiffs

urge us to employ a third, intermediate level of scrutiny, one that is less strict than is appropriate to determine the constitutionality of a statute that burdens a suspect class or fundamental interest but stricter than the "rational basis" test. See Paro v. Longwood Hosp., 373 Mass. 645, 649 n. 6, 369 N.E. 2d 985 (1977). Under such a third level of review, the plaintiffs tell us, quoting Reed v. Reed, 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed. 2d 225 (1971), the court must determine whether the classifications created by the statute are "reasonable, not arbitrary" and "rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320, 96 S.Ct. 2562, 2570, 49 L.Ed. 2d 520 (1970) (Marshall, J.,

dissenting), the plaintiffs say that the court should make its determination "only after a reasonably probing look at the legislative goals and means, and at the significance of the personal rights and interests invaded."

We agree with the plaintiffs that equal protection analysis requires the court to look carefully at the purpose to be served by the statute in question and at the degree of harm to the affected class. We have observed that characterizing the tests to be applied to determine the constitutional validity of legislation as "reasonable relation" and "strict scrutiny" is a "shorthand for referring to the opposite ends of a continuum of constitutional vulnerablitiy determined at every point by the competing values involved." Marcoux v. Attorney Gen., 375 Mass. 63, 65 n. 4, 375 N.E. 2d 688 (1978). However, our acceptance

of that method of analysis does not require us to adopt a third level of review. The rational basis test "includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452, 105 S.Ct. 3249, 3260, 87 L.Ed. 2d 313 (1985) (Stevens, J., concurring). In connection with such an analysis, the significance of a limitation of $20,000 on recovery against charities for personal injuries is a relevant factor.

[3] The plaintiffs' equal protection attack is twofold. They argue that (1) Section 85K has no legitimate purpose, and (2) even if Section 85K has a legitimate purpose, the means chosen by the Legislature to accomplish the objective bear no rational relation to it. The objective of Section

85K clearly is to protect the funds of charitable institutions so they may be devoted to charitable purposes. That objective is just as clearly legitimate. If a charity's property were "depleted by the payment of damages its usefulness might be either impaired or wholly destroyed, the object of the founder or donors defeated, and charitable gifts discouraged." St. Clair v. Trustees of Boston Univ., 25 Mass.App.Ct. 662, 666, 521 N.E. 2d 1044 (1988), quoting Farrigan v. Pevear, 193 Mass. 147, 149, 78 N.E. 855 (1906). The plaintiffs argue that the protection of charitable organizations' property against judgments in personal injury actions is not a legitimate objective because the availability of insurance, the "Universal Health Care Bill," the institution of malpractice tribunals pursuant to G.L. c. 231, Section 60B (198 d.), modification of

the collateral source rule pursuant to G.L. c. 231, Sections 60F, 60G, and 60H (1986 ed.), and the Statewide uncompensated care pool to reimburse hospitals for services rendered to nonpaying emergency room patients pursuant to G.L. c. 6A, Section 75 (1986 ed.), make statutory protection, at least as to hospitals, unnecessary. However, the availability of these sources of protection of charitable funds is not inconsistent with a legislative purpose to provide still further protection.

The plaintiffs also argue that the discrimination between the victims of charitable tortfeasors and other victims, between the seriously injured victims of charitable tortfeasors and those with minor injuries, between "wealthy" charities and impoverished ones, and between charities and noncharities, wrought by Section 85K, cannot be viewed as a rational means of

accomplishing the legislative objective, even if the objective is considered legitimate, of protecting charitable funds. The plaintiffs emphasize the low amount of the statutory cap, arguing that frequently the expenses involved in litigating a serious personal injury negligence case against a hospital may far exceed the allowable recovery. Nevertheless, while we acknowledge the validity of the plaintiffs' assertion, it is not the court's prerogative to determine whether a more equitable distribution of the burden of negligently inflicted personal injuries could be devised. We cannot say that there is no rational relationship between Section 85K's cap on damages and the statute's legitimate objective of preserving charitable assets. See Hearn v. Massachusetts Bay Transp. Auth., 389 Mass. 404, 406, 450 N.E. 2d 602 (1983).

The plaintiffs' final argument is that Section 85K offends their substantive due process rights by failing to provide an adequate substitute for the common law right to recover full compensation for negligently inflicted personal injuries. In cases such as this, where the right infringed on is not a "fundamental" right, we have stated that the question under the due process clause of the Federal Constitution is "whether the statute bears a reasonable relation to a permissible legislative objective," Pinnick v. Cleary, supra 360 Mass. at 14, 271 N.E. 2d 592, and, under the analogous provisions of the State Constitution as whether the statute "bears real and substantial relation to public health, safety, morals, or some other phase of the general welfare." Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing, supra 379 Mass. at 373, 398 N.E.

2d 471, quoting Sperry & Hutchinson Co. v. Director of the Div. of the Necessaries of Life, 307 Mass. 408, 418, 30 N.E. 2d 269 (1940). Citing Decker v. Black & Decker Mfg. Co., 389 Mass. 35, 43, 449 N.E. 2d 641 (1983), and Klein v. Catalano, 386 Mass. 701, 437 N.E. 2d 514 (1982), the plaintiffs argue that "[i]f no substitute remedy is supplied, then the abrogation [of the common law right] must be rationally related to a permissible legislative objective." In addressing the plaintiffs' equal protection argument, we determined that Section 85K is rationally related to a permissible legislative objective. Further discussion is not required. We conclude that Section 85K does not offend the plaintiffs' due process rights.

Judgment affirmed.

HOUSE . . . . . NO. 5716

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THE COMMONWEALTH OF MASSACHUSETTS

HOUSE OF REPRESENTATIVES, JUNE 10, 1971

The committee on Ways and Means, to whom was referred the petition (accompanied by bill, House No. 1535) of the Massachusetts Hospital Association, Robert W. Gillette, Robert C. Buell and Joseph M. Kearney for legislation to limit the liability for tortious acts of certain charitable corporations or organizations report recommending that the accompanying bill (House No. 5716) ought to pass.

For the committee,

GEORGE L. SACCO, JR.

HOUSE - No. 5716

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-One

AN ACT RELATIVE TO NON-PROFIT RELIGIOUS, CHARITABLE, AND EDUCATIONAL CORPORATIONS.

Be it enacted by the Senate and House of Representatives, General Court assembled, and by the authority of the same, as follows:

SECTION 1. Chapter 180 of the General Laws is hereby amended by inserting after section 9A, the following sections-

Section 9B. Any charitable corporation, organized heretofore or hereafter under any general or special laws, any society or association organized exclusively for religious, charitable, educational or hospital purposes shall not be liable to respond in damages, except as is hereinafter set forth, to any person for injury or death caused by the negligence of any agent or

servant of such corporation, society or association, but nothing herein contained shall be deemed to exempt said agent or servant individually from their liability for any such negligence.

Notwithstanding the provisions of the foregoing paragraph nothing contained therein shall exempt any hospital, sanitorium, infirmary, convalescent or nursing home from their liability for any such negligence but recovery in an action shall in no event exceed the sum of $25,000.

SECTION 2. For the purposes of this act but not in limitation thereof, the building and places actually used for colleges, universities, schools, academies, seminaries, orphanages, historical societies, public libraries, religious worship, charitable or hospital purposes, the moral and mental improvement of men, women and children, nursing homes, rest homes, parish houses,

rectories, auditoriums, houses of and for prayer and buildings and places, however named or designated, operated and maintained for equivalent uses, when so operated and maintained by any such non-profit corporation, society or association, shall be deemed to be operated and maintained for a religious , charitable, educational or hospital purpose.

SECTION 3. This act shall be deemed to be remedial and shall be liberally construed so as to afford immunity to the said corporations, societies and associations from liability as provided herein in furtherance of the public policy for the protection of non-profit corporations, societies and associations organized for religious, charitable, educational or hospital purposes.

SECTION 4. The provisions of this shall be deemed to be severable and if any phrase, clause, sentence or provisions of this act is

declared to be unconstitutional or the applicability thereof to any person is held invalid the remainder of this act shall not thereby be deemed to be unconstitutional or invalid.

SECTION 5. This act shall take effect upon its passage.

HOUSE . . . . . NO. 5801

THE COMMONWEALTH OF MASSACHUSETTS

HOUSE OF REPRESENTATIVES, JUNE 14, 1971

The committee on Bills in the Third Reading to whom was referred the Bill relative to non-profit religious, charitable and educational corporations (House, No. 5716) report recommending that the same be amended by the substitution of the accompanying bill (House, No. 5801).

For the committee,

RAYMOND M. LAFONTAINE

HOUSE - No. 5801

JUNE

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-One

AN ACT EXEMPTING CERTAIN CHARITABLE ORGANIZATIONS FROM TORT LIABILITY AND LIMITING THE LIABILITY OF CERTAIN CHARITABLE HOSPITAL ORGANIZATIONS.

Whereas The deferred operation of this act would tend to defeat its purpose, which is to provide forthwith for the immunity of certain charitable corporations, societies and associations from certain actions of tort and limiting the liability of certain charitable hospital corporations, societies and associations in such actions, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled,

and by the authority of the same, as follows:

SECTION 1. Chapter 231 of the General Laws is hereby amended by inserting after section 85I the following two sections:-

Section 85J. A charitable corporation, except a charitable hospital corporation, or any society or association organized exclusively for religious, charitable or educational purposes shall not be liable for the torts of its agents, servants or employees nor for injuries or death to a person resulting from the condition of a building or land occupied by such corporation, society or association.

Section 85K. It shall not constitute defense to, or prevent recovery in, any action of tort brought against any person owning or maintaining any hospital, sanatorium, infirmary maintained in a town, convalescent or nursing home, or rest home, licenses under section seventy-one, that the

defendant was, at the time the cause of action arose, a charitable corporation, association or society, or that such hospital, sanatorium, infirmary maintained in a town, convalescent or nursing home, or rest home, was maintained in whole or in part for any charitable purpose, provided, that recovery in such action shall in no event exceed the sum of twenty-five thousand dollars.

SECTION 2. The provisions of sections eight-five J and eighty-five K of chapter two hundred and thirty-one of the General Laws, inserted by section one of this act, shall apply to causes of action which arose prior to as well as on and after the effective date of this act.

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HOUSE . . . . . .(1970). . . . . NO. 723

AN ACT PROVIDING THAT CERTAIN HOSPITAL CORPORATIONS AND ORGANIZATIONS BE MADE LIABLE FOR THE TORTIOUS ACTS OF ITS EMPLOYEES.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Chapter 111 of the General Laws is hereby amended by inserting after section 70D the following section:

Section 70E. It shall not constitute a defense to, or prevent recovery in, any action of tort brought against any person owning or maintaining any hospital, sanatorium or infirmary that the defendant was, at the time the cause of action accrued, a charitable corporation, association or society, or that such hospital, sanatorium or infirmary was maintained in whole or in part for any charitable purpose.

In the case of Colby v. Carney Hospital, 1969 A.S. 1437, ____ Mass. ____ (1969), our Supreme Judicial Court considered the question of charitable immunity and said that:

> Nothing has been brought to our attention suggesting that the doctrine of charitable immunity is repugnant to any provision of the Constitutions of the United States and the Commonwealth.
>
> In the past on many occasions we have declined to renounce the defence of charitable immunity set forth in McDonald v. Massachusetts Gen. Hosp., 120 Mass. 432, and Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66. See, for example, Barrett v. Brooks Hosp. Inc., 338 Mass. 754; Simpson v. Truesdale Hosp. Inc., 338 Mass. 787; Boxer v. Boston Symphony Orchestra, Inc., 342 Mass. 537, 542. We took this position because we were of opinion that any renunciation preferably should be accomplished prospectively and that this should be best done by legislative action. Now it appears that only three or four states still adhere to the doctrine. See Restatement 2d: Trusts, Section 402 (2), and Comment on Subsection (2); Prosser on Torts (3d ed.) Section 127, at pp. 1021-1024. It seems likely that no legislative action in this

> Commonwealth is probable in the near future. Accordingly, we take this occasion to give adequate warning that the next time we are squarely confronted by a legal question respecting the charitable immunity doctrine it is our intention to abolish it.

It thus appears that the Supreme Judicial Court clearly intends to abolish the charitable immunity doctrine. We are recommending that there be a limit imposed upon recovery against the charitable corporation.

It is necessary for the legislature to balance the desirability of protection for such corporations which include schools, social organizations, museums, and all other kinds of nonprofit institutions as well as hospitals against the interest of the person who is injured as a result of a tort for which the nonprofit corporation is responsible.

The establishment of a $20,000 limitation would provide balancing of the

interests of the two groups involved, and we therefore recommend the following draft act. We might observe that unless the General Court speaks out on this matter charitable immunity will be completely eliminated by a decision of our Supreme Judicial Court.

It is obvious that charitable institutions will be required to provide insurance to protect their assets in the event of claims against them. Such insurance is now carried by a great many nonprofit corporations, and this has been the case for some years. We do not think that the claim on a charity should be without limit, and we point out that death claims in Massachusetts under Chapter 229 of the General Laws are generally limited so that damages for wrongful death alone cannot exceed $50,000.

It is clear that the traditional doctrine that a charitable corporation is not liable for torts can no longer be maintained in the law.

1971 DRAFT ACT

AN ACT ABOLISHING CHARITABLE IMMUNITY AS A DEFENSE

Be it enacted by the Senate and House of Representatives in General Court assembled, and the authority of the same, as follows:

Chapter 180 of the General Laws is hereby amended by inserting after section 9A the following sections:

Section 9B. It shall not constitute a defense to, or prevent recovery in, any action or tort brought against any corporation heretofore or hereafter organized under general or special laws for any of the purposes mentioned in this chapter, that the defendant was, at the time the cause of action accrued, a charitable

corporation, association or society or that the defendant was maintained in whole or in part for any charitable purpose.

Section 9C. The maximum recovery in any action of tort against any such corporation shall be $20,000.

Section 9D. This act shall take effect on January first, nineteen hundred and seventy-two, and shall apply to causes of action rising on or after said date.